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IN THE SUPREME COURT OF THE
UNITED STATES
October Term, 1965.

No. 300

THORNTON R. AMBOLD,
*Petitioner,*

v.

SEABOARD AIR LINE RAILROAD COMPANY,
*Respondent.*

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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**IN THE SUPREME COURT OF THE UNITED STATES**

**October Term, 1965.**

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**No. ——**

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THORTON R. AMBOLD,
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SEABOARD AIR LINE RAILROAD COMPANY,
*Respondent.*

---

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

---

Petitioner, Thorton R. Ambold, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

## OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Virginia, Richmond, Virginia, entered December 16, 1964, is not officially reported. The opinion of the United States Court of Appeals for the Fourth Circuit, entered April 29, 1965, is not officially reported.

## JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered April 29, 1965. The jurisdiction of the Court is invoked under 28 United States Code 1257(3).

## QUESTIONS PRESENTED

I. Whether the jury from the evidence could determine that the Railroad was negligent in part in failing to provide a reasonably safe place in which to work, and whether the Trial Court erred in entering judgment for the Railroad notwithstanding the verdict of the jury for the plaintiff?

## STATUTES INVOLVED

The statute involved is the Federal Employers' Liability Act, 45 U.S.C.A. 51.

## STATEMENT

On October 15, 1964, a jury in the United States District Court for the Eastern District of Virginia, Richmond

Division, returned a verdict in favor of appellant for Twelve Thousand Eight Hundred Seventy-five Dollars ($12,875.00) against appellee in an action arising under the Federal Employers' Liability Act, 45 U.S.C.A. 51. On December 16, 1964, the Trial Judge filed a written memorandum granting judgment to the Railroad notwithstanding the verdict on the ground that negligence had not been proven.

On April 29, 1965, in a two-to-one decision, the United States Court of Appeals for the Fourth Circuit affirmed the judgment. Circuit Court Judge Bell dissented.

## REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals for the Fourth Circuit is squarely in conflict with this Court's decisions in *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 500, 510, 1 L ed 2d 493, 77 S Ct. 443 (1957); *Wilkerson* v. *McCarthy*, 336 U.S. 53, 69 S Ct. 413, 93 L ed 497 (1959); *Schulz* v. *Pennsylvania R. Co.*, 350 U.S. 523, 100 L ed 668, 76 S Ct. 608 (1957); *Gallick* v. *Baltimore and Ohio Railroad Company*, 372 U.S. 108, 9 L ed 2d 618, 83 S Ct 659 (1963); *Harrison* v. *Missouri Pacific Railroad Co.*, 372 U.S. 248, 9 L ed 2d 711, 83 S Ct 690 (1963); *Bailey* v. *Central Vermont Railroad Company*, 319 U.S. 350, 87 L ed 1444, 63 S Ct 1062 (1953); *Basham* v. *Pennsylvania R. Co.*, 372 U.S. 699, 10 L ed 2d 80, 83 S Ct 965 (1963); *Dennis* v. *Denver & Rio Grande Western R. Co.*, 375 U.S. 208, 11 L ed 256, 84 S Ct 291 (1963); *Davis* v. *Baltimore & O. R. Co.*, U.S. , 13 L ed 2d 594, 85 S Ct (1965).

The United States Court of Appeals for the Fourth Circuit did not construe the evidence most strongly in favor of appellant, failed to draw all permissible inferences from the evidence presented, and failed to conclude that reasonable men might draw different conclusions as to whether the evidence established negligence.

Ambold on April 8, 1961, was employed by the Railroad at the Hermitage Diesel Shop at Richmond, Virginia, as a machinist (Tr. 4). At that time, he was sixty (60) years old, had worked nineteen (19) years, and was earning One Hundred Nine and 30/100 ($109.30) Dollars per week (Tr. 4). His duty was to check air brakes on the diesels, both passenger and freight (Tr. 5). Between 11:30 a.m. and 11:45 a.m., he boarded a freight diesel from the shop platform for the purpose of carrying out his duties (Tr. 5). The shop platform is made out of wood, whereas the platform on the diesel is made out of iron (Tr. 5). Immediately below the wooden shop platform and below the diesel unit is a concrete floor, called the shop floor, which is about seven (7) feet below the diesel platform (Tr. 5, 6).

The freight diesel consisted of four or five units coupled with each other and were stationary at the shop. (Tr. 5). Unlike passenger diesels, the freight diesel has a pathway called a running board between the furthermost, or exterior, edge of the diesel, and the hood or cab of the diesel (Tr. 8). On the outside of the running board of the freight diesel is a handrail rising about thirty-eight (38) inches above the running board (Tr. 48). The platform of the diesel and the shop platform are about the same elevation (Tr. 48).

Leading down from the east side of the freight diesel platform, from which Ambold fell, are three (3) steps, two

(2) feet wide and fourteen (14) inches each (Tr. 48). These steps are beneath the level of the shop platform and will not permit a machinist to bridge the space from the diesel platform to the shop platform, which, according to a machinist named L. A. Ellis, spaced a distance of thirty-one (31) inches to thirty-five (35) inches (Tr. 7). There is a distance of about eleven (11) inches separating the edge of the wooden shop platform from the handrail consisting of vertical stanchions on the outside of the running board of the freight diesel (Tr. 8).

The diesel units which were coupled to each other contained a drop step located between two diesel units permitting a machinist to walk from one unit to another (Tr. 9). However, there is no drop step permitting a machinist to walk from the diesel platform to the shop platform (Tr. 8).

Ambold had gone aboard freight diesel unit #1922 for the purpose of checking the air compressor, which was located in the hood of the diesel (Tr. 9). After completing his inspection, he attempted to step from the platform of the freight diesel to the shop platform, a distance of thirty-one (31) to thirty-five (35) inches, failed to negotiate the distance and fell to the concrete shop floor below, where he suffered severe, painful and permanent injuries (Tr. 10).

On passenger diesels the hood or cab of the diesel fits flush on the outside of the diesel (Tr. 16). Thus, a machinist has to step only about ten (10) inches to reach the shop platform from a passenger diesel (Tr. 17).

L. A. Ellis, who had worked as a machinist for the Railroad since 1945, had also worked in the Railroad's diesel shops in Hamlet, North Carolina, and Jacksonville, Florida

(Tr. 69). According to Mr. Ellis, the procedure for machinists when stepping off a freight diesel onto the shop platform and vice versa, differed in the Richmond, Virginia, and Jacksonville, Florida, shops. At the Railroad's Richmond, Virginia, shop, the normal manner is for the machinist to step from the diesel platform to the shop platform (Tr. 69). At Richmond, machinists do not step from the running board of the freight diesel onto the shop platform, because they would have to duck down to go underneath the handrail, and it would be awkward for machinists to step off the freight diesel by way of the handrail (Tr. 69, 70).

However, at the Jacksonville, Florida, shop of the Railroad, machinists had been instructed *never* to step from the shop platform to the diesel platform, because it was too much of a step (Tr. 75, 87). At the Jacksonville, Florida, shop, the Railroad furnished a platform, which was made out of corrugated iron, about four (4) feet long and thirty-four (34) inches wide, which was placed under the handrail from the shop platform (Tr. 73).

The distance at the Jacksonville shop from the shop platform to the freight diesel is about six (6) inches wider than the distance at Richmond (Tr. 90). Mr. Ellis estimated that the distance from the shop platform to the handrail of the freight diesel at the Richmond shop is about ten (10) inches (Tr. 72).

Mr. Ellis estimated that a machinist at the Richmond shop actually has to step about forty (40) inches to clear the distance from the diesel platform to the shop platform, as the right foot of a machinist would have to land on the shop platform about four (4) or five (5) inches in order to stand (Tr. 86).

As an expert witness, Mr. Ellis stated that if a machinist is not extra cautious in stepping from the diesel platform to the shop platform, he will slip and fall (Tr. 89), to-wit:

> "Q. I'm asking you if, in your opinion, you think it is hazardous in stepping the 40 inches that you say you have to step.
>
> "A. That's right. But step to step, if you're extra cautious in stepping, you may be able to hold your equilibrium. But if you're not, you'll slip.
>
> "Q. In other words, if you are extra cautious?
> "A. Yes, that's right.
>
> "Q. But if you are not extra cautious, what?
> "A. You will slip down, you will fall down there.
>
> "Q. All right, Now, in your experience at the Richmond shop, have your foremen or anybody else on the railroad ever afforded you this platform that they use at the Jacksonville, Florida, shop?
> "A. No, sir."

Mr. Ellis testified that diesels remain at the Richmond shop for repairs up to eight (8) hours (Tr. 101). Although the Railroad's witness, Lyman Earl Jarratt, testified that the machinists at the Richmond shop can either step from the running board to the shop platform, or from the diesel platform to the shop platform (Tr. 132), Mr. Ellis contradicted this statement by testifying that machinists at the Richmond shop do not step from the running board to the shop platform (Tr. 101).

Mr. Ellis stated that the windows on the west side of the wall of the diesel shop at Richmond are dirty at times and do not stay clean all the time (Tr. 96).

Mr. Ellis had been a safety first employee at the Norfolk Naval Ship Yard, in Portsmouth, Virginia, before working for the Railroad (Tr. 85). After Ambold fell, Mr. Ellis took his place in performing this same type of work (Tr. 86). The work that he did at Jacksonville was what he called "dead" work, but he also performed the same type of work at the Richmond diesel shop (Tr. 91, 95). He checked air brakes at the Jacksonville shop, and it was not necessary for him to carry tools at all times at the Jacksonville shop, nor was it necessary for machinists at Jacksonville to use the portable platform, which weighed about forty (40) or fifty (50) pounds (Tr. 75), to move parts out of the diesel onto the shop platform (Tr. 92).

Ambold estimated that each week before he fell he took between fifty (50) and seventy-five (75) steps in his duties, going to and from the shop platform and the diesel platform of the freight diesel (Tr. 29). Both Ambold and Ellis, prior to the fall, had slipped in stepping off the diesel platform to the shop platform, but had not fallen all the way to the shop floor (Tr. 30, 77). The Railroad at its Richmond shop had never instructed Ambold or Ellis in the manner to step off the freight diesel onto the shop platform (Tr. 31, 75). At the time Ambold fell, he had stepped from the diesel platform to the shop platform in the usual and customary manner (Tr. 12).

The three photographs, introduced as Plaintiff's Exhibits 1, 2, and 3 and reproduced in Appellant's Appendix, represent the actual freight diesel in the approximate position it was standing at the time Ambold fell (Tr. 7). These photographs clearly show the freight diesel, the diesel platform, the distance separating the diesel platform from the

shop platform, the three steps leading towards the shop floor from the freight diesel, the concrete shop floor, and the wooden platform.

Ambold corroborated Mr. Ellis that the Railroad had never furnished him, or any other machinist, any form of a platform, or catwalk, leading from the shop platform onto the freight diesel, such as the Railroad furnished its machinists at its Jacksonville shop (Tr. 15, 89).

The following evidence was sufficient for the jury to conclude that the Railroad was negligent in part in failing to provide a safe place to work.

1. Machinists at the Richmond shop usually and customarily had to step from the diesel platform of the freight diesel onto the shop platform and vice versa, a distance of thirty-one (31) to thirty-five (35) inches, at least fifty (50) to seventy-five (75) times a week.

2. The Railroad at the Richmond shop had not instructed its machinists to use the running board of the freight diesel to step onto the shop platform and vice versa.

3. The Railroad at its Richmond shop did not furnish its machinists a portable platform, or catwalk, to enable them to go to and from the diesel and the shop platform.

4. A machinist had to step only about ten (10) inches from a passenger diesel onto the shop platform, whereas he had to step thirty-one (31) to thirty-five (35) inches, plus the length of his two feet, or about forty (40) inches to bridge the gap from the diesel platform to the shop platform and vice versa, at the Richmond shop.

5. At its Jacksonville shop, the Railroad had forbidden its machinists to step from the diesel platform to the shop platform, because it was too long a step. The distance was about six (6) inches more at the Jacksonville shop than at the Richmond shop.

6. The Railroad at its Jacksonville shop furnished its machinists a portable platform, or catwalk, reaching from the shop platform underneath the handrail of the freight diesel to permit machinists to go to and from.

7. The expert witness, Ellis, testified that if a machinist is not extra cautious at the Richmond shop in stepping from the diesel platform to the shop platform, he will slip and fall.

8. Ambold at the time of the fall was sixty (60) years old.

9. The thirty-eight (38) inch high handrail on the outside of the running board of the freight diesel prevented Ambold from going on and off the freight diesel.

10. The Railroad furnished Ambold and other machinists a drop step, or a hinge gate, to go from one diesel unit to another, but furnished no such appliance to go from the diesel to the shop platform.

11. The Railroad had placed a concrete shop floor seven (7) feet below the level of the diesel platform, and knew that the three (3) steps leading down from the diesel platform cannot be used by machinists to step onto the shop platform, being below the level thereof.

12. That a sixty-year old man is not as agile as a younger man, and that it is foreseeable by the Railroad that such a man, who has to step across a wide distance fifty (50) to seventy-five (75) times a week, would not make it and will fall to the shop floor below the diesel platform.

13. The Railroad itself constructed its shop platform at its Richmond shop, owned, ordered and operated the freight diesel from which Ambold fell, and knew that its machinists there had to step such a wide distance to get to and from the shop platform.

The memorandum opinion of the Trial Judge and the majority opinion of the United States Court of Appeals for the Fourth Circuit disclosed that both Courts failed to review the evidence in the light most favorable to appellant. Both opinions stress that Ellis testified that a step from the diesel platform in Richmond would not be hazardous if lighting conditions were satisfactory, and the light was satisfactory. The opinions omit the testimony wherein Ellis testified that if a machinist is not extra cautious in stepping from the diesel platform to the shop platform, he will slip and fall (Tr. 89).

The opinions attempted to differentiate the work at the Jacksonville and Richmond shops by stating that work at the Jacksonville shop requires twenty-four (24) hours or more, whereas only minor repairs requiring not more than eight (8) hours work are done at the Richmond shop. In *Bailey* v. *Central Vermont Railroad Company,* 319 U.S. 350, 87 L ed 1444, 63 S Ct 1062 (1953), the Court held that the railroad's duty to furnish a safe place to work is a continuing one, and the railroad is not relieved from liability by the fact that employees' work at the place in question is infrequent or fleeting.

The opinions state that heavy equipment was transferred over a space about forty (40) inches wide at the Jacksonville shop, whereas machinists at Richmond, while empty-handed, were required to step over a space thirty-two (32) inches wide, with the option of going over or under a rail thirty-eight (38) inches high and stepping over a space eleven (11) inches wide. Again the opinions failed to consider in the light most favorable to Ambold the testimony of Ellis that machinists at Richmond always had to step from the diesel platform to the shop platform, a distance of thirty-one (31) to thirty-five (35) inches (Tr. 69, 70, 101). Furthermore, the court did not take into consideration Mr. Ellis' testimony that machinists at the Jacksonville shop did not always carry tools and did not always transfer equipment on the portable platform (Tr. 91, 92).

The opinions mention that the area was well-lighted by a skylight overhead. Mr. Ellis testified that the windows on the west side of the wall of the Richmond diesel shop were dirty at times and did not stay clean all the time (Tr. 96). The evidence did not show whether the windows were or were not clean at the time of the accident. Ambold testified that there were skylight windows, but did not testify as to whether they were dirty or clean (Tr. 36). The Railroad's witness, Jarratt, testified that lighting conditions were good, the door of the shop being open, there being a skylight, but again, he did not testify as to whether the skylight was clean or dirty (Tr. 131).

As the dissenting opinion of Judge Bell points out, to step across a distance of thirty-five inches (35″), with knowledge that if the step is not long enough you will fall seven (7) feet to the concrete floor below, is in itself evidence of negligence sufficient to justify a jury verdict.

## CONCLUSION

To protect the integrity of the many decisions of this Court that the right to trial by jury is part and parcel of the remedy afforded railroad workers under the Federal Employers' Liability Act, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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## APPENDIX A

OPINION OF
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT.

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No. 9838.

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THORNTON R. AMBOLD,
Appellant,

*versus*

SEABOARD AIR LINE RAILROAD COMPANY,
Appellee.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT RICHMOND.
STERLING HUTCHESON, DISTRICT JUDGE.

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(Argued April 7, 1965. Decided April 29, 1965.)

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Before HAYNSWORTH, Chief Judge, BELL, Circuit Judge, and STANLEY, District Judge.

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Howard I. Legum (Fine, Fine, Legum, Schwan & Fine on brief) for Appellant, and Lewis T. Booker (Eppa Hunton, IV, and Hunton, Williams, Gay, Powell & Gibson on brief) for Appellee.

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EDWIN M. STANLEY, District Judge:

The plaintiff, Thorton R. Ambold, brought this action under the Federal Employers Liability Act, 45 U.S.C. § 51, et seq., in the United States District Court for the Eastern District of Virginia, for personal injuries sustained in the course of his employment. The defendant, Seaboard Air Line Railroad Company, is charged with negligently failing to use ordinary care to provide the plaintiff with a reasonably safe place to work.

The case was tried before a jury. At the conclusion of the plaintiff's evidence, and again at the conclusion of all the evidence, the defendant moved for a directed verdict on the ground that the plaintiff had not shown that his injury resulted, in whole or in part, from the negligence of the defendant. Reserving a decision on the motions, the case was submitted to the jury, under appropriate instructions, which returned a verdict for the plaintiff in the amount of $12,875. The defendant thereafter moved for judgment notwithstanding the verdict. The District Judge sustained the motion and entered a judgment for the defendant on the merits. We affirm the judgment of the District Court.

There is no serious dispute as to the basic facts. On April 8, 1961, the date of his alleged injury, plaintiff was employed by the defendant at its diesel shop in Richmond, Vir-

ginia, as a machinist. At that time he was 60 years of age and had worked for the defendant about 19 years. His principal duty was to check air brakes on diesel locomotives. He had been performing this identical work at the same location for several years. In the performance of his duties, plaintiff was required to go on board diesel locomotives to make inspections.

The portion of the shop where plaintiff worked consisted of a long wooden platform, generally referred to as the shop platform, which ran parallel to the railroad tracks. The locomotives to be inspected were "spotted" on these tracks. The shop platform was built over a concrete pit, the floor of which was approximately seven feet below the level of the platform. The diesel locomotives had metal platforms at the end, called the locomotive platform, and a metal catwalk running along the side. Both the catwalk and the locomotive platform were about the same elevation as the shop platform. Leading down from the locomotive platform were three steps, referred to as a stepwell, each two feet wide and 14 inches high. These steps were beneath the level of the shop platform and were designed for use in boarding and leaving the locomotive. The distance from the locomotive platform across the stepwell to the shop platform was from 31 to 35 inches.[1] The catwalk running alongside the locomotive was about 11 inches from the shop platform. At each side of the stepwell there were hand rails for use in boarding and leaving the locomotive, and to assist in stepping to and from the shop platform. Hand rails, about 38 inches high, were also outside the catwalk.

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[1] This estimate of distance was given by the witness Ellis. However, the plaintiff, and the other witnesses offered by the parties, estimated the distance to be not more than 32 inches.

On the day in question, the plaintiff was on board one of defendant's diesel locomotives for the purpose of checking the air brakes. The locomotive was in a stationary position and parallel to the shop platform. Shortly before noon, after he had finished checking the locomotive, plaintiff left his work for lunch. He had no tools in his hand, and carried only a flashlight in his pocket. As he stepped from the locomotive platform across the stepwell, he slipped and fell to the concrete shop floor beneath. There was no grease or oil or other similar substance on plaintiff's shoes, the platform, or "anywhere around." Lighting conditions in the diesel shop were good that day. Light came from the skylight overhead and an open door at the end of the pit. The plaintiff testified that the weather was good, and that he had no difficulty seeing where he was going. With commendable candor, plaintiff stated that the accident happened because he "misjudged" the distance from the locomotive platform to the shop platform, and simply did not "take a long enough step."

The plaintiff had been taking the exact same step, day after day, 50 to 75 times a week, for several years prior to his fall, and he had never fallen before. When he returned to work following his injury, he continued to take the same step, with the same frequency, for another two and one-half years, and never fell again. Never at any time did the plaintiff make any complaint whatever about having to take the step, nor did he make any suggestion about using a ramp across the opening between the diesel platform and the shop platform. No employee of the defendant, including the plaintiff, ever protested concerning any danger or hazard in taking the step, either before or after the defendant's injury. Mr. Jarratt, the diesel shop foreman, an em-

ployee of the defendant for 51 years, testified that never in his experience in the diesel shop had anyone fallen while taking the same step from the locomotive platform to the shop platform, a step his machinists took 50 or more times a day. The testimony of Mr. Jarratt, while offered by the defendant, was not questioned or challenged by the plaintiff.

L. A. Ellis, another machinist employed by the defendant, was permitted to testify, over objection, as an expert on safety and with respect to a practice he had observed in the defendant's shop in Jacksonville, Florida. Ellis testified that in the Jacksonville diesel shop, a metal ramp was furnished to provide access to locomotives from the shop platform. However, the evidence disclosed that the situation in Jacksonville was completely different from the situation in Richmond. At Jacksonville, the shop platform was from 6 to 8 inches further from the locomotive platform than at the Richmond diesel shop, and the ramp extended from the shop platform to the locomotive at a point under the handrail running along the catwalk. Further, the Jacksonville ramp was used by machinists while sliding, handing and carrying parts and tools between the locomotive catwalk and the shop platform. In addition to the greater distance between the shop platform and the locomotive platform, the Jacksonville shop did repair or overhaul work, which usually required 24 or more hours. In Richmond, this type of work was performed at the roundhouse and none was done at the diesel shop. The Richmond diesel shop is concerned primarily with minor repairs requiring not more than 8 hours of work. Although Ellis had observed the ramps used in Jacksonville a considerable time prior to plaintiff's injury, he never made any complaint or suggestion to the defendant concerning any danger or

hazard with respect to persons stepping to and from the locomotives at the Richmond diesel shop. Testifying as an expert, Ellis stated that a step from the locomotive platform to the shop platform in Richmond would be hazardous if the lighting conditions were not good at the time, but that such a step would not be hazardous if lighting conditions were satisfactory. Specifically, he stated that if it was "a light day outside," and in the "middle of the day," he would not say there was anything hazardous about making the step.

The narrow question presented for decision is whether, with reason, the conclusion may be drawn that the negligence of the defendant played any part at all in producing the injury for which the plaintiff seeks damages. We are not unmindful of the liberal interpretation which the courts have placed upon the Federal Employers Liability Act, which was designed for the benefit and protection of railroad employees. Even so, the statute does not make the employer an insurer, and there is a point beyond which its application must be denied. *Inman* v. *Baltimore & Ohio Railroad Company,* 361 U. S. 138 (1959) and *Atlantic Coastline R. Co.* v. *Craven,* 4 Cir., 185 F. 2d 176 (1950).

In evaluating the evidence, largely undisputed, to determine whether the defendant was shown to be negligent, even in the slightest, in failing to provide the plaintiff with a reasonably safe place to work, thereby making the case for the jury, we take as a guide the case of *Rogers* v. *Missouri Pacific Railroad Co.,* 352 U. S. 500 (1957), where it is stated:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion

that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. . . .

". . . The employer is stripped of his common-law defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit. . . .

* * *

". . . The decisions of this Court after the 1939 amendments teach that the Congress vested the power of decision in these actions exclusively in the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury. . . ."

While the *Rogers* case emphasizes the liberal interpretation that must be placed upon the statute, and defines the narrowly limited area in which the courts are permitted to disturb jury verdicts in cases of this type, we do not understand the decision to relieve the plaintiff from the burden of proving some act of negligence on the part of the railroad. In *Dessi* v. *Pennsylvania Railroad Co.*, 3 Cir., 251 F. 2d 149 (1958), cert. denied 356 U.S. 967 (1958), the Court, in discussing the *Rogers* case, stated:

> "This language [in the *Rogers* case] indicates that the role of a defendant's negligence in helping bring about the injury may be small. It does not suggest that an F.E.L.A. plaintiff can carry his burden of proof without evidence that the role was real. Indeed, the paragraph containing the quoted sentence continues with this observation:
>
> "'Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. . . .'
>
> "The repeated use of the phrase 'with reason'—it appears three times in this short paragraph—is a persuasive indication that the court intended no departure from the familiar and normal requirement of our jurisprudence, as repeatedly stated in its own father recent decisions, that the party with the burden of proof must 'present probative facts from which the negligence and the causal relation could reasonably be inferred. . . .'"

In many respects, the instant case resembles, and we believe is ruled by, the decision in *Inman* v. *Baltimore & Ohio Railroad Co.,* 361 U. S. 138 (1959), where the employee claimed damages for an injury received when an intoxicated automobile driver ran into him one midnight while he was on duty flagging traffic for a passing train. The railroad was charged with negligence for failure to use ordinary care to provide a reasonably safe place for the employee to work. The judgment entered on the jury verdict for the plaintiff was reversed by the Court of Appeals of Ohio for the reason that "there was a complete failure of proof to establish . . . negligence." The Supreme Court, using the *Rogers* case as a yardstick, affirmed, observing that the "burden of proving that the crossing was an unsafe place to work was on petitioner," and that such proof "depended on some type of testimony showing the hazards at the crossing." It was found to be of considerable significance that "there [was] no evidence of complaint to the railroad, nor . . . other testimony of similar occurrences in the record." Under such circumstances, it was reasoned that the evidence was "too slender a reed" to say that the decision of the Ohio court was erroneous. Here, like in *Inman,* there was no evidence of complaint to the railroad, or testimony of similar occurrences. Plaintiff had made the identical step many times each week over a period of years, both before and after his injury, without falling or complaining of any hazard. The same was true with respect to all other machinists working with the plaintiff. No other hazard, such as oil, grease or debris, was present. The area was well lighted, and the only witness who testified that the condition was hazardous qualified his opinion by saying that no hazard would exist if there was sufficient light to enable a person to see. This witness was

not present when plaintiff fell, and did not profess to know anything about the lighting conditions at that time. The plaintiff stated he could see where he was stepping, and did not contend that poor lighting played any part in the accident. His only explanation was that he simply misjudged the distance and did not take a long enough step. Under these circumstances, to hold that a hazardous condition existed, or that the employer was negligent, even in the slightest, in not providing a safe place to work would, in our opinion, be tantamount to stripping the statute of all limitations and constituting the defendant an insurer of the safety of its employees. Consequently, we believe that the evidence in this case, when taken in the light most favorable to the plaintiff, presents one of those "infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury." *Rogers* v. *Missouri Pacific Railroad Co., Supra.*

We believe our decision also finds support in *Cuddy* v. *Western Maryland Railway,* 229 F. Supp. 443 (M.D. Pa., 1963), where a motion by the railroad for judgment notwithstanding the verdict was sustained. The judgment was affirmed by the Court of Appeals, *Cuddy* v. *Western Maryland Railway,* 3 Cir., 332 F. 2d 371 (1964), and certiorari was denied by the Supreme Court of the United States, 379 U. S. 840 (1964). Also see *Atlantic Coastline R. Co.* v. *Craven,* 4 Cir., 185 F. 2d 176 (1950), where the Court of Appeals reversed the trial court for failure to set aside the jury verdict for the reason that "there was no substantial evidence upon which the question of negligence could have been submitted to the jury," and *Moore* v. *Chesapeake &*

*O. R. Co.*, 340 U. S. 573 (1951), affirming the action of the district court in sustaining a motion for judgment notwithstanding the verdict.

Since there was no evidence of negligence, the District Court properly sustained the motion for judgment notwithstanding the verdict.

*Affirmed.*

J. SPENCER BELL, Circuit Judge, dissenting:

I do not agree that fair-minded jurors could not "honestly differ whether fault of the employer played any part" in Ambold's injury. *Rogers* v. *Missouri Pacific R.R. Co.*, 352 U.S. 500, 510 (1957). Time and time again the Supreme Court has said that "only when there is a complete absence of probative facts to support the conclusion reached [by the jury] does a reversible error appear." *Basham* v. *Pennsylvania R.R. Co.*, 372 U.S. 699, 700-01 (1963). I think the existence of a condition which required the plaintiff to take a thirty-one to thirty-five inch step over a seven foot void in the performance of his work was sufficient evidence of an unsafe place to work to take this case to the jury. The arguments set forth in the majority opinion should have been, and undoubtedly were, made to the jury. The case having been properly submitted to them, I do not think the jury's verdict should have been disturbed. *Dennis* v. *Denver & Rio Grande Western R.R. Co.*, 375 U.S. 208 (1963); *Gallick* v. *Baltimore & Ohio R.R. Co.*, 372 U.S. 108 (1963); *Webb* v. *Illinois Central R.R. Co.*, 352 U.S. 512 (1957); *Rogers* v. *Missouri Pacific R.R. Co.*, *supra.*

Believing that the judge's intervention to set aside the verdict was an intolerable invasion of the jury's province, I would reverse the decision of the district judge and reinstate the jury verdict.

## APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

---

No. 9838.

---

Thornton R. Ambold,
Appellant,

vs.

Seaboard Air Line Railroad Company,
Appellee.

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT RICHMOND.

---

Upon petition of the appellant, by his counsel, and for cause shown,

It is ordered that the issuance of a certified copy of the judgment of this Court, in lieu of a mandate, to the Clerk of the District Court in the above-entitled case, be, and it is hereby, stayed pending application of the appellant in the Supreme Court of the United States for a writ of certiorari to this Court, provided the application for a writ of certiorari is filed in the Supreme Court within thirty days from May 29, 1965.

May 7, 1965.

CLEMENT F. HAYNSWORTH, JR.
*Chief Judge, Fourth Circuit*

FILED

May 7, 1965

MAURICE S. DEAN
*Clerk*

A true copy,

Teste:

MAURICE S. DEAN, *Clerk,*
*U. S. Court of Appeals for the Fourth Circuit*

## APPENDIX C

Federal Employers Liability Act, 45 U.S.C.A. § 51

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 28 1965
JOHN F. DAVIS, CLERK

In The

# Supreme Court of the United States

October Term, 1965

No. 300

THORNTON R. AMBOLD,

*Petitioner,*

v.

SEABOARD AIR LINE RAILROAD COMPANY,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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July 28, 1965

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*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### I.

### OPINION BELOW

The opinion below in the United States Court of Appeals for the Fourth Circuit has been printed since the petition for writ of certiorari was filed and is reported at 345 F. 2d 30 (4th Cir. 1965).

### II.

### JURISDICTION

The jurisdictional requisites are properly and adequately set out in the petition for writ of certiorari.

## III.

## THE QUESTION PRESENTED

The sole question presented by the petition is whether the trial judge, the Honorable Sterling Hutcheson, of the United States District Court for the Eastern District of Virginia at Richmond, and the United States Court of Appeals for the Fourth Circuit erred in holding that there was insufficient evidence to support a verdict obtained by petitioner, hereafter called Mr. Ambold, against respondent, hereafter called the Railroad, in a Federal Employers Liability Act case.

## IV.

## STATEMENT OF THE CASE

Unlike most Federal Employers Liability Act cases, there is no real conflict in the testimony here. Indeed, there were no eyewitnesses to Mr. Ambold's injury, a fall he sustained on April 8, 1961, while working in the Railroad's diesel shop in Richmond, Virginia, so his own testimony as to how his accident occurred is uncontradicted and served as a basis for the action of the Court of Appeals in affirming the Trial Court's action in setting aside his verdict. Despite the lack of conflict in the testimony we will restate it to arrange it in an orderly fashion for purposes of argument.

### 1. Mr. Ambold's Own Version of His Fall

Mr. Ambold was first employed by the Railroad in 1942. He had been doing exactly the same job he was doing on April 8, 1961, for fourteen or fifteen years (Tr. 28). That day, as for many years previously, Mr. Ambold was employed at the Railroad's Hermitage Yards in Richmond, Virginia, as a machinist in the diesel shop. His duties consisted of checking air brakes on diesel locomotives.

Just before lunch that day Mr. Ambold was on board Diesel No. 1922, checking its air brakes. The locomotive was in a stationary position parallel to a raised wooden platform, called the shop platform. The locomotive has a metal, corrugated catwalk running alongside the engine with stanchions running vertically from the catwalk to the handrail above it. From the edge of the catwalk to the shop platform is eleven inches. At the end of the locomotive is another corrugated metal walkway called the diesel platform. The catwalk, the diesel platform, and the shop platform were level with one another, designed so that workers need not climb up and down while carrying tools to gain ready access to the locomotive. According to Mr. Ambold, it is 32 inches from the diesel platform to the shop platform across the stepwell (Tr. 7).

Although the stepwell is 32 inches across, and about two feet wide, there is a handrail on each side of the stepwell. On the left side the handrail runs along the catwalk until it intersects at a right angle with the stepwell and is, consequently, eleven inches from the shop platform and twenty-one inches from the beginning of the stepwell. Since it intersects at a right angle, it does not parallel the stepwell. On the right side there is a handrail which does parallel the stepwell and descends as the steps in the stepwell do (Pl. Ex. 1, Tr. 48).

After he finished checking the locomotive Mr. Ambold went to the diesel platform at the end of the locomotive to step off onto the shop platform for lunch. As he stepped from the locomotive platform across the stepwell, he slipped and fell to the concrete shop floor beneath. He had nothing in his hands at the time he fell (Tr. 31).

Mr. Ambold testified very frankly and fairly why he fell (Tr. 35, 36, 46):

"Q All right. Now, why did your foot slip?

"A Just didn't go far enough on the platform.

"Q In other words, you didn't make a long enough step, is that right?

"A I misjudged.

* * *

"Q You just didn't take a long enough step?

"A That's right."

### 2. The Scene of the Fall

Immediately after his fall, Mr. Ambold reported the incident to Lyman E. Jarratt, his foreman. Shortly thereafter Mr. Jarratt went to the scene of the accident, inspected it, and found no grease or oil or anything else on the shop platform (Tr. 131). Mr. Ambold also testified there was no foreign matter on his shoe, on the platform, or anywhere around (Tr. 36).

Lighting conditions in the diesel shop were good that day. Mr. Ambold testified that the weather was good and that he had no difficulty seeing where he was going (Tr. 36, 37). Mr. Jarratt testified that the lighting, which came from both the skylight overhead and the open door at the end of the pit, was good (Tr. 131).

### 3. This Was a Unique Accident

Although Mr. Ambold had been taking the same step, day after day, fifty or seventy-five times a week, for years prior to his fall, he had never fallen before (Tr. 30, 31). When Mr. Ambold returned to work after his fall he continued to take the same step just as frequently for another two and a half years, and he never fell again (Tr. 30, 31). Neither before or after his fall did Mr. Ambold make any complaint about having to take the step, nor did he make

any suggestions about using a ramp across the opening between the diesel platform and the shop platform when taking the step (Tr. 37).

Mr. Jarratt, the diesel shop foreman, an employee of the Railroad for fifty-one years, testified that never before or since in his experience in the diesel shop had anyone fallen while taking the same step from a locomotive to the shop platform, a step his machinists take fifty or more times a day. No one has made any suggestion to him, either before or after Mr. Ambold's fall, that ramps should be provided for use of those stepping from a locomotive to the shop platform (Tr. 133, 134).

#### 4. The Work in Jacksonville Was Different

Mr. Ambold offered evidence, over objection, to show that metal ramps were used to get to and from locomotives and the shop platform in the Railroad's shops in Jacksonville, Florida. The evidence showed, however, that the situation in Jacksonville was completely different from the situation in Richmond. Only Mr. L. A. Ellis, another machinist employed by the Railroad, testified about the Railroad's Jacksonville shop. He testified that the metal ramps were placed inside the metal stanchions which run along the locomotive's catwalk up to the handrail and that machinists in Jacksonville used the ramps inside the stanchions under the handrail to go back and forth between the shop platform and the locomotives (Tr. 73, 74).

Mr. Ellis also testified that machinists did not go under the stanchions in Richmond, although the distance in going that way to the shop platform was only eleven inches, because they would have to duck down to get beneath the handrail (Tr. 70).

Mr. Ellis testified that dead work, that is, work requiring twenty-four or more hours to complete, is done in the Rail-

road's Jacksonville shop. This work involves, among other work, dismantling locomotive engines and taking off heavy parts and removing them from the locomotive to the shop platform. The parts were handed across the ramp or, if they were heavy enough, pushed or slid across the ramp to the shop platform. Machinists working on dead work in Jacksonville from time to time carry tools across the ramps also (Tr. 91-95).

By contrast, only minor repairs, those requiring between one and eight hours to complete, are done in the diesel shop in Richmond. Dead work, requiring more than eight hours to complete, is done in the roundhouse or in the yard (Tr. 94-96, 101).

Finally, the shop platform in Richmond is substantially closer to the locomotive than it is in Jacksonville. In Jacksonville the opening between the shop platform and the locomotive is six to eight inches or 20-25 per cent wider than in Richmond (Tr. 90).

### 5. The Expert Testimony

Mr. Ellis was permitted to give his opinion whether the step Mr. Ambold was taking when he fell was hazardous. At first Mr. Ellis said that if a person were not extra cautious he would slip and fall in taking the step, although Mr. Ellis acknowledged he himself had taken the step on numerous occasions and had never fallen or made complaint about it (Tr. 77, 100). Mr. Ellis went on to say, however (Tr. 96, 97):

"Q Now, just a moment ago you said that whether this was a hazardous step or not would depend upon the time of day and the lighting, did you not?

"A That's true.

"Q All right. Now, explain to us when this would not be a hazardous step.

"A Like that light there now that you have up there that's illuminating this floor which we have overhead, if it's a good light there, you can see. But if that light is out, you cannot see.

* * *

"Q All right, if it's a light day outside and it is the middle of the day, is there anything hazardous about making this step?

"A No, I wouldn't say it was."

Mr. Ellis was furloughed from the Railroad at the time of Mr. Ambold's accident and consequently knows nothing about the circumstances surrounding it (Tr. 91, 95).

## V.

## ARGUMENT

### 1. The Railroad Was Not Guilty of Negligence Which Caused or Contributed to Mr. Ambold's Injuries

We agree that since the decision in *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500 (1957) it has been clear that if employer negligence played any part, even the slightest, in a railroad employee's injury, a jury question is presented under the Act. This does not mean, however, that a plaintiff is relieved of the burden of proving some act of negligence on the part of the railroad. As the court pointed out in *Dessi* v. *Pennsylvania R. Co.*, 251 F. 2d 149 (3d Cir. 1958), *cert. den.* 356 U.S. 907 (1958), in discussing the *Rogers* case, at p. 151:

> "This language [in the *Rogers* case] indicates that the role of a defendant's negligence in helping bring about the injury may be small. It does not suggest that

an F.E.L.A. plaintiff can carry his burden of proof without evidence that the role was real. Indeed, the paragraph containing the quoted sentence continues with this observation:

> "'Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the inquiry or death. . . .'
>
> "The repeated use of the phrase 'with reason'—it appears three times in this short paragraph—is a persuasive indication that the court intended no departure from the familiar and normal requirement of our own jurisprudence, as repeatedly stated in its own rather recent decisions, that the party with the burden of proof must 'present probative facts from which the negligence and the causal relation could reasonably be inferred. . . .'"

Therefore, Mr. Ambold had the burden of proof to show that the Railroad was negligent and that its negligence contributed to his injuries. Here Mr. Ambold contends the Railroad was negligent in failing to furnish him a safe place to work. He makes no other contention of negligence, nor can he.

But the Railroad's duty was only to furnish him a reasonably safe place to work, not an absolutely safe place to work. As the court recognized in *Atlantic Coast Line R. Co.* v. *Craven,* 185 F. 2d 176 (4th Cir. 1950), *cert. den.* 340 U.S. 952 (1951), at p. 178:

> "An employer has the duty to provide his employees a safe place to work, but this duty cannot be absolute. Dangers are implicit in such occupations as railroading, and railroads are not insurers of their employees. . . ."

Merely asserting that the Railroad did not furnish him a safe place to work is not evidence either that it did not furnish a safe place to work or of negligence. Mr. Ambold's theory of liability is that the Railroad was negligent in requiring him to take a step of thirty-two inches from the locomotive to the shop platform. While counsel for Mr. Ambold consistently refer to the space as being from thirty-one to thirty-five inches, that distance is an estimate made by Mr. Ellis, who was not even employed by the Railroad at the time. Mr. Ambold testified that the distance was thirty-two inches, no more, no less, and he was the only eyewitness and should know.

Mr. Ambold makes no contention that the area was poorly lighted or that the platform was slippery or uneven. To the contrary, it affirmatively appears from the evidence that the area was well lighted and that there was no grease or any other foreign object on the platform. The shop platform was level and was at the same height as the locomotive platform from which Mr. Ambold was stepping when he fell.

Counsel for Mr. Ambold argue in their petition that the evidence did not show whether the windows and the skylight in the shop were clean or dirty. But Mr. Ambold's own testimony is that the area where he was working was well lighted. Certainly the burden is not upon the Railroad to prove that the windows and skylight were clean when there is no evidence they were dirty, and the uncontradicted evidence is that the area where Mr. Ambold fell was well lighted.

Only if a thirty-two inch space to be crossed, with handrails available at approximately midpoint on each side of the space, in and of itself is not a reasonably safe place to work did the trial court commit reversible error in setting

the jury's verdict aside. The standard Army marching pace is thirty inches: distances are generally paced off in roughly yard lengths. A thirty-two inch step is simply not strained or unusual in any sense of the word, even less so here because of the availability of handrails to assist one in crossing the gap. Mr. Ambold was furnished a reasonably safe place to work. The only evidence he offers to the contrary is the mere fact that he fell, and the mere happening of an accident is not evidence of negligence, *Atlantic Coast Line R. Co.* v. *Collins,* 235 F. 2d 805, 807 (4th Cir. 1956), *cert. den.* 352 U.S. 942 (1956).

This same space has been crossed safely by Mr. Ambold and his fellow workers literally hundreds of times a week both before and after Mr. Ambold's fall. No one else has ever fallen before or since. No one has made complaint to the Railroad that the crossing was dangerous in any sense. The situation does not suggest danger, and there are no facts in evidence from which the Railroad could possibly have anticipated any danger.

In *Inman* v. *Baltimore & Ohio R. Co.,* 361 U.S. 138 (1959), the decision of this Court closest in point to the case at bar, the plaintiff, a railroad flagman at a grade crossing in a city, was struck by an automobile at night while stopping traffic at the crossing. The plaintiff contended the railroad had failed to furnish him a safe place to work. The Court of Appeals of Ohio reversed a jury verdict for the plaintiff upon the ground that no negligence on the railroad's part had been shown.

This Court, by divided vote, affirmed. This Court said, at pp. 140, 141:

> "... In measuring Ohio's disposition of the case here by the *Rogers* yardstick, we must affirm. The Act does not make the employer an insurer. Here petitioner had

> been working at Bettes Corners for seven years, performing these same duties under like circumstances and, for some three years, on this identical midnight shift. No accidents had occurred during that long period. In light of this background, we believe that the evidence here was so thin that, on a judicial appraisal, the conclusion must be drawn that negligence on the part of the railroad could have played no part in petitioner's injury.
>
> ". . . The burden of proving that the crossing was an unsafe place to work was on petitioner. It depended on some type of testimony showing the hazards at the crossing. There is no evidence of complaint to the railroad, nor is there testimony of similar occurrences in the record. . . ."

The evidence in the case at bar goes even further than the evidence in the *Inman* case. In the *Inman* case there was no evidence of any complaint to the railroad and no evidence of any similar occurrences. Here, in addition, there is affirmative, uncontradicted evidence that, although this step had been taken literally thousands of times, both before and after Mr. Ambold's fall, no one else had ever fallen. There is affirmative, uncontradicted evidence that no one, not Mr. Ambold, not Mr. Ellis, his safety expert, nor anyone else, ever complained about the step. Mr. Ambold's fall was certainly not as foreseeable as was the possibility that a flagman at a grade crossing might be struck by an automobile at night; yet in the *Inman* case this Court held the evidence was insufficient to create a jury issue as to the railroad's negligence. Of necessity, then, the evidence is insufficient here, and the decisions of the two courts below should not be disturbed.

Mr. Ambold presented evidence that metal ramps were used in the Railroad's Jacksonville shops for going and

coming between freight locomotives and the shop platform there. Upon this evidence Mr. Ambold contends that the Railroad was negligent in not furnishing similar ramps for use in the Hermitage diesel shop where he fell.

But the uncontradicted evidence shows the circumstances under which the ramps were used in Jacksonville were completely dissimilar from the situation at Hermitage. In the first place, the distance from the locomotive to the platform was six to eight inches greater in Jacksonville.

In addition, the ramps in Jacksonville were not put across the stepwells but were instead placed inside the stanchions from the catwalk to the shop platform. Use of ramps in the manner used in Jacksonville would not have prevented Mr. Ambold's accident. He could have gone under the handrail (where the ramp was placed in Jacksonville) at the Hermitage Yards if he had desired, and he would have had a step of only eleven inches to cover. He did not do so, knowing he had crossed the stepwell hundreds of times in complete safety. Furthermore, his own expert witness, Mr. Ellis, testified that machinists at Hermitage would not go under the handrail because they had to duck down.

In addition, the nature of the work done in Jacksonville is completely different from the work done at Hermitage and causes and necessitates the use of such ramps. In Jacksonville dead work is performed in the shop. Heavy parts are taken on and off locomotives and are passed across to or from the shop platform. It is necessary to slide and push some of the parts, and the ramp then is essential. On the other hand, no such work is done in the diesel shop at Hermitage. Only minor repairs are made, not necessitating passing of tools or parts across to or from the shop platform. Heavy work of the type done in the shop in Jacksonville is done in the roundhouse or the yard at Hermitage.

Even if the comparison between the heavy duty work shop at Jacksonville and the inspection shop at Hermitage were valid the mere fact that some other method might have been followed at Hermitage is no evidence that the method actually followed constituted the step an unsafe place to work. The fact that some other method might have been followed is not the test, as the court so clearly recognized in reversing the plaintiff's judgment in *Atlantic Coast Line R. Co.* v. *Craven,* 185 F. 2d 176 (4th Cir. 1950), *cert. den.* 340 U.S. 952 (1951).

In that case the plaintiff, a brakeman, was injured as he attempted to cross a track blocked by a slowly moving cut of cars. He climbed upon one car and in so doing fell and lost his leg. He contended that the railroad failed to provide him a safe place to work because it should have furnished a bridge or tunnel to cross the tracks. The court applied the proper test, at p. 179:

> "... A complete rearrangement of the yard, a bridge or a tunnel, or some system of traffic regulation might have prevented this accident. The great majority of railroad accidents (including those not involving negligence) could by some means be prevented. The test is whether reasonable men, examining the circumstances and the likelihood of injury, would have taken those steps necessary to remove the danger [citations omitted]."

Applying the test the court described in the *Craven* case, there are no facts in the case at bar from which reasonable men could have anticipated the likelihood of injury so as to take steps to remove the danger. The Railroad fully complied with its duty to furnish Mr. Ambold a reasonably safe place to work, and no verdict to the contrary can be sustained.

### 2. Mr. Ambold's Own Negligence Was the Sole Proximate Cause of His Injuries

Mr. Ambold was a qualified, experienced machinist at the time of his fall. While he was sixty years old at the time of his fall, there is no evidence that he was physically incapacitated or restricted in any way. Indeed, to the contrary, his entire medical testimony was that he was in excellent condition at the time of his fall.

When Mr. Ambold stepped from the locomotive to the shop platform he was doing exactly what he had done, time after time, day after day, without danger or injury to him. Mr. Ambold did not attempt to explain his fall by claiming that the area was poorly lighted, or that grease or oil on his shoe, on the locomotive, or on the platform caused him to slip. Such was not the case, as he very fairly admitted. Instead he stated that he fell because he "just didn't go far enough on the platform"; he just "misjudged" his step (Tr. 35, 36, 46).

Surely the Railroad cannot be held responsible because once in a lifetime Mr. Ambold misjudged his step. He was as familiar with the step as anyone else and was as alert to any conceivable danger it presented as anyone else. He never complained about any potential danger before or after his fall. He saw no danger in the situation, for there was none.

In *Atlantic Coast Line R. Co.* v. *Collins,* above, 235 F. 2d 805 (4th Cir. 1956), *cert. den.* 352 U.S. 942 (1956), an employee claimed he was injured while throwing a switch which was hard to operate. The evidence showed, however, that neither the plaintiff nor anyone else had ever complained the switch was hard to operate. The evidence also showed the switch had worked properly on all other occasions the evening the plaintiff was injured. The court held

that the plaintiff had not proved any negligence at all on the railroad's part. The evidence in this action is largely the same; there had been no complaint about the opening, either by Mr. Ambold or by anyone else, and employees had crossed over it safely thousands of times without difficulty. Just as there was no evidence of negligence on the railroad's part in the *Collins* case, there is no evidence of negligence here.

If Mr. Ambold had not by his own testimony misjudged his step then the accident would not have happened. Suppose Mr. Ambold had been walking down a well-lighted, even, dry stairway, had misjudged his step, had missed the bottom step, and had fallen. Would the Railroad be liable there? Certainly not; the sole cause of his fall there would have been his own negligence in misjudging his step. By the same token, the sole cause of Mr. Ambold's fall here was his own negligence in misjudging his step.

### 3. The Facts of This Case Do Not Warrant the Granting of A Writ of Certiorari

Counsel for Mr. Ambold have cited a number of cases in which this Court has upheld a jury verdict for an injured worker in a Federal Employers Liability Act case. The most recent of these is *Davis* v. *Baltimore & Ohio R. Co.*, 379 U.S. 671 (1965).

In the *Davis* case there was a clear conflict of testimony whether the injured employee had himself negligently backed a forklift truck into an elevator shaft or whether another employee had negligently left the forklift truck unattended, allowing it to strike the employee, knocking him into the shaft. This Court held, perfectly properly, that an issue of fact was presented for a jury's determination.

On the other hand, we have cited a number of cases in this brief where this Court and other courts have held that

the evidence of a Railroad's negligence was insufficient to create a jury issue. Notable among the cases cited, because of its similarity to this case, is *Inman* v. *Baltimore & Ohio R. Co.*, 361 U.S. 138 (1959).

What the citation of authority by both parties really means is that each Federal Employers Liability Act case is decided on its own facts. Because the facts differ so from case to case, decisions in other cases are helpful in resolving a particular case only in a very general way.

This case does not present a complex or involved set of facts. There is essentially no conflict in the testimony. The only issue is whether a railroad is guilty of negligence in asking a worker, unencumbered by tools, to cross a thirty-two inch stepwell, with handrails available on both sides of the stepwell, at a well-lighted, dry, level location. Not in any view of the evidence can this amount to negligence, and the two courts below correctly concluded that there was no evidence of negligence. The facts of the case do not warrant this Court's taking its time to make a third appraisal of the evidence to determine the correctness of the trial court's action in entering up judgment for the Railroad notwithstanding the verdict.

## VI.

## CONCLUSION

Because this case involves only determination of a factual matter unique to it, and because the two courts below have correctly determined that issue, the petition for writ of certiorari should be denied.

Respectfully submitted,

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